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IN THE

Supreme Court of the United States

October Term, 1969

NO. 1181

LESTER G. MADDOX, ET AL,

Appellants,

versus

BEN W. FORTSON, JR., ET AL,

Appellees.

Appeal from the Supreme Court of the State of Georgia

Appellants' Motion to Advance and Jurisdictional Statement

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INDEX

	Page
Motion to Advance	1
Jurisdictional Statement	3
Opinion Below	3
Jurisdiction	4
Georgia Constitutional Provisions Involved	5
Questions Presented	6
Statement of Case	7
The Questions Are Substantial	12
Conclusion	25
Proof of Service	26
Appendix "A"—Opinion and Judgment of the Supreme Court of the State of Georgia of January 26, 1970	1-a–13-a
Denial of Motion for Rehearing	13-a
Appendix "B"—Order and Judgment of the Superior Court of Fulton County, Georgia of December 13, 1969	1-b–12-b
Appendix "C"—Provisions of the Georgia Constitution and Laws Directly Involved in this Litigation	1-c–7-c
Art. 2, Sec. 2, Par. 1, Ga. Code Ann. 2-801	1-c
Art. 5, Sec. 1, Par. 1, Ga. Code Ann. 2-3001	1-c
Art. 5, Sec. 1, Par. 2, Ga. Code Ann. 2-3002	2-c
Art. 5, Sec. 1, Par. 3, Ga. Code Ann. 2-3003	2-c
Art. 5, Sec. 1, Par. 4, Ga. Code Ann. 2-3004	3-c
Art. 5, Sec. 1, Par. 6, Ga. Code Ann. 2-3006	3-c
Ga. Code Ann., Section 34-301	3-c
Ga. Code Ann., Section 34-801	5-c
Ga. Code Ann., Section 34-1006	5-c
Ga. Code Ann., Section 79-205	6-c
Ga. Code Ann., Section 110-1101	7-c

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MOTION TO ADVANCE

Pursuant to Rule 43 (4) of the Rules of this Court, Appellants respectfully move this Court as follows:

1. To reduce Appellees' time to move under Rule 16 (1), to February 21, 1970; in order that said matter may be placed on the Court's Conference Calendar March 2, 1970, the parties having agreed that Appellants will file their Jurisdictional Statement and Motion to Expedite February 14, 1970.

2. To advance the time for filing Appellants' brief on the merits to March 20, 1970 and Appellees' brief on the merits April 3, 1970.

3. To advance the case for argument to the week of April 20, 1970.

The extraordinary public importance of this case demands immediate review.

Code Section 34-1006, Ga. Code Annotated, Appendix "C," Page 5c requires that all qualifications for party nominations in the Georgia Democratic Primary, 1970, close at 12:00 Noon on the second Wednesday in June, 1970. Appellant Maddox desires and wishes to qualify and run, and Appellants wish to vote for him in said Primary.

Appellants further aver that presently twenty-five (25) states place no restriction on a Governor succeeding himself; twenty-five (25) do place a restriction on succession; seven (7) Governors, otherwise eligible to succeed themselves this year, are prohibited from seeking re-election because of anti-succession clauses and provisions in their State Constitutions. In addition, numerous other City, County, and State officials will be prohibited due to similar statutory and constitutional prohibitions, denying Appellants and other voters the right to exercise their constitutionally protected right of suffrage and equal protection of the law under the 1st and 14th Amendments to the United States Constitution.

Should the Court not grant this request, Appellants will, of necessity, have to seek a stay of the Democratic Primary scheduled for the second Wednesday in Sep-

tember, 1970. *Code Section 34-801, Ga. Code Ann.*, Appendix "C," Page .

Appellants are authorized by Appellees to state that all parties concur in this request, subject to Appellees' rights under Rule 16 (1).

We respectfully request that you grant this Motion.

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JURISDICTIONAL STATEMENT

Appellants appeal from the Opinion and Judgment of the Supreme Court of the State of Georgia entered on the 26th day of January, 1970, affirming the Order and Judgment of the Trial Court entered the 13th day of December, 1969, dismissing Appellants' complaint for failure to state a claim upon which relief can be granted, either at law or in equity, and from the denial of Appellants' Motion for Rehearing on 29 January 1970, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this Appeal, and that substantial questions are presented.

OPINION BELOW

The January 26, 1970 Opinion and Judgment of the Supreme Court of the State of Georgia is not yet reported, and is reproduced as Appendix "A" (Pages 1a-12a) hereto; the Order of January 29, 1970, denying the Motion for Rehearing is not yet reported; there was a mere denial; the Order and Judgment of the Trial Court dated the 13th day of December, 1969 is not a reported

decision, and is reproduced as Appendix "B". (Pages 1b-12b) hereto.

JURISDICTION

This action was brought seeking a Declaratory Judgment pursuant to *Ga. Code Section 110-1101*, Appendix "C" (Page 7c) to have the constitutional prohibition against succession in office by governors contained in Article V, Section I, Paragraph I of the 1945 Constitution of Georgia, Appendix "C" (Pages 1c, 2c) declared unconstitutional, and seeking injunctive relief to protect Appellants' rights. The Opinion and Judgment of the Supreme Court of the State of Georgia, entered on the 26th day of January, 1970, affirmed the Trial Court's Order and Judgment entered on the 13th day of December, 1969. Appellants' Motion for Rehearing was denied by the Supreme Court of the State of Georgia on the 29th day of January, 1970, and Notice of Appeal was filed in that Court on the 6th day of February, 1970.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U. S. C. #1257 (2).

Decisions sustaining the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal are:

Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942);

Brockingham v. Rhodes, 396 U.S. ____, 90 S. Ct. 206 (1969);

Brandenburg v. Ohio, 395 U.S. 444 (1969);

Mills v. Alabama, 384 U.S. 214 (1966).

GEORGIA CONSTITUTIONAL PROVISIONS INVOLVED

Appellants contend that the portion of the Georgia Constitution which appears in italics below is unconstitutional and void under the due process and equal protection clauses of the 14th Amendment to the United States Constitution and the 1st Amendment to the United States Constitution made applicable to the states by the due process and equal protection clauses of the 14th Amendment. The Trial Court and the Supreme Court of Georgia held that said provision of the Georgia Constitution is constitutional and valid.

Article V, Section I, Paragraph I, of the 1945 Constitution of the State of Georgia (Ga. Code Ann. 2-3001) is quoted as follows: (italics added)

> "Paragraph I. Governor; Term of Office; Salary; etc. The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. *The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office.* He shall have a salary of seven thousand five hundred dollars per annum until January 1, 1947. The salary of the Governor for each year thereafter shall be twelve thousand dollars per annum until otherwise provided by law passed by a majority vote of both branches of the General Assembly, which shall not be increased or diminished during the period for which he shall have been elected; nor shall he receive, within that time, any other emolument from the United States, or either of them, or from any foreign power. The State officers, required by the Constitution to be

elected at the same time, for the same term, and in the same manner as the Governor shall also hold office for four years."

QUESTIONS PRESENTED

1. Does the prohibition against an incumbent governor succeeding himself, found in Article V, Section I, Paragraph I of the 1945 Constitution of the State of Georgia, constitute invidious discrimination and an unreasonable and arbitrary restriction on the right of Appellant Maddox to run for and seek a consecutive term as Governor of the State of Georgia under the Due Process and Equal Protection clauses of the 14th Amendment of the Constitution of the United States?

2. Does the said prohibition constitute an invidious discrimination and an unreasonable and arbitrary restriction of the right of Appellants, as qualified voters, to have the candidate of their choice, Lester G. Maddox, run for and seek a consecutive term as Governor under the Due Process and Equal Protection clauses of the 14th Amendment?

3. Does said prohibition constitute an invidious discrimination and an unreasonable and arbitrary restriction on the right of Appellants to vote and to vote effectively for the candidate of their choice under the Due Process and Equal Protection clauses of the 14th Amendment?

4. Does said prohibition constitute an impairment of the right of Appellants to associate for the advancement of their political beliefs—the election of Lester G. Maddox as governor for a consecutive term—under the 1st and 14th Amendments?

5. Does said prohibition constitute an impairment of

the right of Appellants of effective expression of their political views by voting for the candidate of their choice —Lester G. Maddox—under the 1st and 14th Amendments?

STATEMENT OF THE CASE

Lester G. Maddox, together with seven other Georgia registered voters, filed an action in the Fulton Superior Court on November 20, 1969 against BEN W. FORTSON, JR., as Secretary of State of the State of Georgia and as Chairman of the State Election Board of Georgia; STATE ELECTION BOARD OF GEORGIA; ARTHUR K. BOLTON as Attorney General of the State of Georgia; THE DEMOCRATIC PARTY; MEMBERS OF THE DEMOCRATIC PARTY EXECUTIVE COMMITTEE and EXECUTIVE SUBCOMMITTEE, and THE REPUBLICAN PARTY and its EXECUTIVE COMMITTEE in their representative capacity.

In their complaint (R 14-43) Appellants allege that Lester G. Maddox, the incumbent governor, meets the qualifications for governor as set forth in Art. V, Sec. I, Par. VI (Ga. Code Ann. 2-3006), Appendix "C," Page 3c, and Art. II, Section II, Par. I (Ga. Code Ann. 2-801), Appendix "C," Page 1c, and that Lester G. Maddox is legally qualified to be elected to the office of Governor for a consecutive term. It was further alleged that Lester G. Maddox desires and intends to be a candidate in the 1970 Georgia Democratic Gubernatorial Primary and in the 1970 General Election for Governor of Georgia.

Co-Appellants (all Appellants other than Lester G. Maddox) allege in their complaint that they are quali-

fied to vote in said Democratic primary and general election, and are desirous of having Lester G. Maddox, the incumbent governor, succeed himself as Governor, and desire, wish and intend to vote for Lester G. Maddox in said election. (R 15, 16)

Appellants allege that the Democratic Party of Georgia, pursuant to Georgia Ed. Code Section 34-801, Appendix "C," Page 5c will conduct a primary election on the second Wednesday in September, 1970, to select a person to run as its candidate for the office of Governor of the State of Georgia in the general election to be held on the Tuesday following the first Monday in November, 1970. They further allege that through its officials, the Democratic Party will supervise the holding of said 1970 Democratic gubernatorial primary; determine the eligibility of persons offering to qualify as candidates; count the ballots; and certify to Appellee Ben W. Fortson, Jr., as Secretary of State, the names of the persons determined to have been nominated in said primary election. (R 19, 20)

Appellant Lester G. Maddox alleges that he desires to participate in said Democratic primary and is ready, willing and able to comply with all other rules, regulations and qualifications of the Democratic party as a gubernatorial candidate, and to execute such forms as are required; to tender the required qualifying fee; and in all other respects comply with the rules of said primary as to qualifying in order to participate in said primary election. (R 26)

As to the Secretary of State, Appellants allege that pursuant to Ga. Code Section 34-301, Appendix "C," Pages 3c, 4c, and Art. V, Section I, Par. III of the Georgia Constitution (Ga. Code Ann. 2-3003), Appendix

"C," Pages 2c, 3c, the Secretary of State is required to receive and determine the qualifications of all nominees and candidates filing notice of their candidacy and eligibility in the general election to be held on the Tuesday following the first Monday in November, 1970, and to furnish the several Ordinaries of the State of Georgia with official ballots and election supplies, and to certify to the Ordinaries the names of the candidates nominated in the primaries and otherwise; and to receive the returns of the election of Governor, and transmit said returns to a constitutional officers election board; and issue a commission to the person elected Governor. (R 20)

Because of the said prohibition against succession in office, Appellants allege that the Appellees named herein will refuse to permit Lester G. Maddox to be a candidate in the 1970 Democratic Primary and the 1970 General Election unless the Trial Court intervenes in the matter and declares said prohibition unconstitutional. Additionally, Appellees would further refuse to allow Lester G. Maddox to hold office should he be the winning candidate. (R 26, 27)

Appellants ask in their complaint that said prohibition against succession in office be declared unconstitutional to insure Appellants an equal and fair opportunity to have Appellant Maddox run for the office of Governor, and to afford them adequate opportunity to develop campaign organization, strategy, and prepare and plan for promotional literature, schedules and financing. (R 22-26) Appellants also ask that Appellees be enjoined and restrained from refusing to accept Appellant Maddox as a qualified candidate in said 1970 Democratic Primary and said 1970 General Election.

Appellants' complaint raises the Federal questions sought to be reviewed here by alleging that the prohibition against an incumbent governor succeeding himself, found in Art. V, Sec. I, Par. I of the Georgia Constitution, violates the Due Process and Equal Protection clauses of the 14th Amendment and inhibits and impairs the 1st Amendment rights to free expression and association made applicable to the States by the 14th Amendment. (R 22-26 and 87, 88)

In their answers, Appellees, as their first defense, move to dismiss Plaintiffs' complaint on the ground that the complaint fails to state a claim against the Defendants upon which relief can be granted at law or in equity. (R 64)

All material facts as alleged in Plaintiffs' complaint are admitted by the Appellees, except that Appellant Maddox is qualified to seek the office of Governor because of said prohibition. (R 65-68; 71-77, and 100-104)

The Trial Court allowed the request of two citizens to intervene on the side of Appellees.

At the time the complaint was filed, the presiding Judge of Fulton Superior Court set the trial date on the 17th day of December 1969. In recognition of the public interest involved, counsel for all parties, with the consent of the Court, agreed for the trial of said cause to be advanced to 8:30 A.M. on the 11th day of December 1969, such acceleration being in the public interest.

The matter came on for trial on the 11th day of December 1969 before Judge Osgood O. Williams, presiding Judge of the Superior Court of Fulton County,

pursuant to agreement of all parties, and thereafter on the 13th day of December 1969, the Trial Judge entered an Order sustaining the Appellees' Motion to Dismiss. Appendix "B," Pages 1b-12b. (R 107-119)

In that Order, the Trial Court stated that "The Court firmly believes the prerequisite qualification of becoming a candidate for the office of Chief Executive for the State of Georgia which restricts tenure is a reasonable qualification. I therefore find that portion of Art. V, Sec. I, Par. I of the Constitution of Georgia of 1945 complained of by the complainants is not offensive to the Constitution of the United States. Appendix "B," Page 10b. (R 117, 118)

"The restriction does not dilute a vote, it does not disenfranchise any citizens, it is not aimed at any individual or class. The Constitutional provision simply requires of the voters that they vote for qualified candidates as commanded by the Constitution." Appendix "B," Pages 10b, 11b. (R 118)

Within three days of the Trial Court's ruling, Appellants filed their Notice of Appeal to the Supreme Court of Georgia. (R 14-19)

Thereafter, in their Enumeration of Errors, Grounds 1, 2, 3, 5, and 6, filed in the Supreme Court of Georgia, Appellants reasserted the Federal questions raised in their complaint. (R 147-152)

In less than six weeks the case was argued before, and decided by, the Supreme Court of the State of Georgia. The Supreme Court of the State of Georgia affirmed the decision of the Trial Court by holding:

> "The provision of ART. V, SEC. I, PAR. I, of the 1945 Constitution that: 'The Governor serving at the time of the adoption of this Constitution and

> future governors shall not be eligible to succeed themselves and shall not be eligible to hold office until after the expiration of four years from the conclusion of his term of office,' is not violative of the provisions of either the First Amendment or the Fourteenth Amendment to the Constitution of the United States."

Appendix "A," Page 1a. (R 153)

Acting expeditiously, the Supreme Court of Georgia denied Appellants' Motion for Rehearing on January 29, 1970, the day it was filed. Appendix "A," Page 13a. (R 178)

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Georgia on the 6th day of February, 1970. (R 179-182)

THE QUESTIONS ARE SUBSTANTIAL

Appellants' appeal to this Court is predicated upon the theory that the prohibition against an incumbent governor succeeding himself, found in Art. V, Sec. I, Par. 4 of the Georgia Constitution, violates, and is repugnant to, the Due Process and Equal Protection clauses of the 14th Amendment and inhibits and impairs the 1st Amendment rights to free expression and association made applicable to the States through the 14th Amendment of the United States Constitution. These same questions were properly raised in the Trial Court and reasserted in the Georgia Supreme Court. Both of the State Courts rejected Appellants' contentions by holding that said prohibition is not offensive to the Federal Constitution.

Federal questions are thus properly presented and they are substantial, as will be hereinafter demonstrated.

So substantial are the Federal questions presented that their resolution requires plenary consideration, with briefs on the merits and oral argument.

These Federal questions are substantial because at the heart of said prohibition is a denial of the right to a full, free and unabridged vote and a denial of the right to offer for public office. These rights are the basic ingredients for viable representative government, and any limitations placed on them by a State must be given a close and exact examination. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969).

The State of Georgia and all qualified voters herein have a very real interest in the outcome of this case. To strike down said prohibition as unconstitutional will grant to all voters in Georgia a complete and effective right to vote that extends not only to the casting and counting of votes, but also to what a voter may put on his ballot, regardless of his political persuasion. The State will also derive a benefit from granting to each of its voters an equal voice in the selection of public officials. Equal opportunity at the ballot box to select public officials encourages participation in the political processes of the State which in turn has a salutary effect.

The effect of said prohibition, if allowed to stand, will be to disenfranchise Appellants and the class of voters they represent in the 1970 Democratic Gubernatorial Primary and General Election and future elections by preventing them from casting a meaningful vote, that is, a vote for the candidate of their choice. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Matthews v. Little*, ____ U.S. ____, 24 L. Ed. 2d 45 (1969). It will also deny Appellant

Maddox the right to be considered for public service. *Turner v. Fouche*, ___ U.S. ___, 38 LW 4090 (decided January 19, 1970); *Kramer v. Union Free School District*, supra, at 626; *Matthews v. Little*, supra, and the right of Appellants to express and advance their political views by having the candidate they prefer placed on the ballot in the 1970 elections. *Williams v. Rhodes*, supra. It will have the further effect of denying Appellants and the class they represent the fundamental right to full and effective participation in the political processes of the State of Georgia, and this participation can only be achieved by having the right to vote for the candidate of their choice. See *Reynolds v. Sims*, 377 U.S. 533 (1964). Such denial caused by said prohibition strikes at the very heart of representative government and it cries out for correction by this Court.

A decision by this Court striking down said prohibition will have National consequences since the idea of prohibiting succession in office is in use throughout the United States, with some of the States prohibiting their governors from succeeding themselves.[1]

[1] The following states have no limitation on consecutive terms for Governor: Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

Twelve states prohibit a governor from succeeding himself in office.

Thirteen states prohibit a governor from serving more than two successive terms.

The presence or absence of a limitation in other states does not solve the questions presented; however, the fact that in 25 states no prohibition exists is convincing evidence that half of our states operate effectively without the presence of a restriction on gubernatorial succession. The presence of a limitation is not inherently fundamental to good state government and the limitation under attack cannot be said to serve a compelling state interest.

This Court has consistently disapproved of state-imposed qualifications and restrictions which interfere with the right to vote freely and effectively. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) struck down the poll tax; *Carrington v. Rash*, 380 U.S. 89 (1965) held that a Texas statute denying the ballot to a bona fide resident merely because he was a member of the Armed Services violated the Equal Protection clause; *Gray v. Sanders*, 372 U.S. 368 (1963) and *Reynolds v. Sims*, 377 U.S. 533 (1964) insured that all voters have equal voting power; *Kramer v. Union Free School District*, 395 U.S. 621 (1969) removed limitations upon the right to vote in school elections based upon owning a property interest or having children or grandchildren in the schools; and *Williams v. Rhodes*, 393 U.S. 23 (1968) where this Court protected the voting interest in casting a ballot for the particular candidate one prefers above all others. Compare *Hall v. Beals*, 396 U.S. ____, 90 S. Ct. 200 (1969) where 6 months residency requirement to vote was challenged as being unconstitutional.

This Court has also recently disapproved of state-imposed restrictions which limit the right to offer for public office. In *Turner v. Fouche*, ____ U.S. ____, 38 LW 4090 (Jan. 19, 1970), a Georgia requirement that school board members be freeholders was challenged as being a violation of the Equal Protection clause of the 14th Amendment and in sustaining that challenge, this Court said at Page 15:

> "We may assume that the appellants have no right to be appointed to the Taliaferro County Board of Education. *But appellants and the members of their class do have a Federal Constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.*

The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate Federal Constitutional guarantees." (Emphasis added)

Moreover, this Court in *Kramer v. Union Free School District*, supra, at 626, stated: "Any unjustified discrimination in determining *who may participate in political affairs or in selection of public officials, undermines the legitimacy of representative government.*" (Emphasis added). See also *Matthews v. Little*, supra, where Justice Black relieved a candidate from paying a qualifying fee in an election until a full hearing by this Court under the Equal Protection clause of the 14th Amendment.

The right to run for public office is an analogue of the right to vote. *Matthews v. Little*, unreported (Civil Action No. 12962, District Court, Northern District of Georgia); *White v. Clements*, 39 Ga. 232, 244 (1869). One right without the other is meaningless.

In striving to protect the right to vote fully and effectively and the right to seek public office, this Court has declared that a state law which is alleged to infringe on these rights must be carefully and meticulously scrutinized since the exercise of these rights in a free and unimpaired manner is preservative of other basic civil and political rights (See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)), and these rights are fundamental and rank among our most precious freedoms. *Williams v. Rhodes*, supra. And only compelling state interests can justify imposing burdens on these fundamental freedoms. *Williams v. Rhodes*, supra; *Kramer v. Union Free School District*, supra, at 627; see also *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Additionally, in re-

viewing State statutes or Constitutions, which deny some citizens the fundamental right to vote and right to offer for public office, the general presumption of constitutionality afforded such state statutes or constitutions and the traditional approval given state classifications if this Court can conceive of a rational basis for the distinctions made, are not applicable. The burden is upon the State to offer compelling justification for the distinctions made in the area of fundamental freedoms.[2] *Kramer v. Union Free School District*, supra; see also *Shapiro, Commissioner of Welfare of Connecticut v. Thompson*, 394 U.S. 618 (1969). Any classification which serves to penalize the exercise of a fundamental right (right to vote and right to seek public office) unless shown by the State to be necessary to promote a compelling governmental interest, is unconstitutional.

Georgia has now granted to the electorate the complete right to elect the Governor. Article V, Section I, Paragraph II and IV of the Georgia Constitution, Georgia Code Section 2-3002 and 2-3004 (Appendix "C," Pages 2c, 3c); See *Fortson v. Morris*, 385 U.S. 231 (1966). Having granted this right to the electorate, Georgia may not classify or make distinctions among the electorate which are not consistent with Federal Constitutional guarantees. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966).

However, this is exactly what Georgia does through the application of said prohibition. Using said prohibition, Georgia says to Appellants and the class of

[2] Justice Felton, in his special concurrence, Appendix "A," Pages 10a, 11a, *Maddox, Et Al v. Fortson, Et Al*, misconstrued and misapplied the burden of proving compelling justification, holding with regard to constitutional provisions that it rested upon the attacker, not the State..

voters they represent, "You may vote in the 1970 Democratic Gubernatorial Primary and General Election, but you may not vote for the candidate of your choice—Lester G. Maddox, because he is the incumbent governor." Georgia also says to Appellants that "We will not accept Maddox as a candidate, we will not place his name on the ballot, and we will not count your vote if you write in Maddox's name because he is the incumbent governor although he is otherwise qualified." At the same time the State says to those other voters who make up the remainder of the electorate, "You may vote in said 1970 elections for any candidate you prefer. If that candidate is not on the ballot we are providing a blank space on the ballot so that you may write in the name of the candidate you wish to vote for and that vote will be counted."

The foregoing illustrates that said prohibition does set apart the class of voters who wish to vote for Appellant Maddox in 1970 and it denies this class of voters their right to vote effectively. This right to vote effectively, as guaranteed by this Court in the Williams case carries with it the right to vote for the candidate of one's choice. *Williams v. Rhodes*, supra; *Reynolds v. Sims*, supra. It is no answer to say that appellants have the right to vote in said 1970 elections for candidates other than Maddox. If a voter cannot cast his ballot for the candidate he prefers above all others, his right to vote is meaningless.

Since said prohibition does classify and treats appellants and the class of voters they represent differently from the remainder of the electorate in the 1970 elections, it must be given a close and exacting examination by this Court, and since said prohibition does

clearly impinge on the exercise of a fundamental right (right to vote), the burden rests upon the State of Georgia to show this Court in its examination of said prohibition that the unequal treatment it brings upon Appellants is necessary to promote a compelling governmental interest.

Appellants' position is that said prohibition is not based on a compelling governmental interest and is therefore unconstitutional. We wish to point out to this Court that the Supreme Court of Georgia did not in its Opinion mention a single reason or justification for said prohibition. The short answer is that said prohibition is a political gimmick or football that has been in and out of Georgia's constitutions[3] several times, and it does not really serve a useful governmental purpose.

This matter of weighing any interest the State might claim to be protecting against the interest of Appellants who are disadvantaged by said prohibition is better suited to resolution by this Court after plenary consideration, with briefs on the merits and oral argument.

Appellants have shown that said prohibition will deny them their right to vote for the candidate of their choice, thereby raising a substantial Federal question and their only remedy lies in relief from this Court.

Georgia by statute grants to every citizen of the State

[3] There was no restriction in the provisional government against succession, but it was a temporary government. From 1777 to 1780, the Governors were elected for one year on a rotation basis. From 1789 until 1865, there was no prohibition on gubernatorial succession. It was put in in 1865, eliminated in 1868 and restored in 1877. In Georgia, the Governors have been free to succeed themselves for a total of 86 years and have been hobbled by this device for a total of 118 years.

the right to hold office unless disqualified by the Georgia Constitution. Georgia Code Section 79-205 (Appendix "C," Pages 6c, 7c); *McLendon v. Everett*, 205 Ga. 713. This right to hold office must certainly include the right to be a candidate for that office. *Turner v. Fouche*, supra, as previously pointed out, recognized that there is a Federal constitutional right to be considered without the burden of invidiously discriminatory disqualifications. In granting citizens the privilege of running for and holding office, Georgia may require that candidates meet certain qualifications provided those qualifications do not make distinctions which cannot pass muster before the Federal Constitution.

The normal qualifications for the office of Governor of the State of Georgia are found in Article V, Section I, Paragraph VI (Ga. Code Section 2-3006) and Article II, Section II, Paragraph I (Ga. Code Section 2-801) (Appendix "C," Pages 1c, 3c). Appellant Maddox as the incumbent governor meets those qualifications. Any other citizen who desires to be a candidate in the 1970 race for governor must also meet these same qualifications, and once these qualifications are satisfied, the citizen is qualified to hold the office of Governor provided he is successful at the polls. However, the situation is different as to Appellant Maddox. Although Maddox meets these normal qualifications for the office of Governor, he is still not eligible to run because of the additional requirement of said prohibition against succession in office. Appellant Maddox will be the only candidate in the State who will be affected by said prohibition in the 1970 elections. It applies to Maddox and to him alone.

That said prohibition discriminates is obvious. It de-

nies Appellant Maddox the privilege and fundamental right of running for and holding office while other candidates are granted the privilege of running for and holding office if successful at the polls. The distinction is that Appellant Maddox is the incumbent governor, which raises the question of whether the State is constitutionally justified in making that distinction. In order for this distinction (said prohibition) to be valid, it must serve some compelling State interest, and the State has the burden of showing the presence of a compelling State interest.

As already stated, Appellants take the position that said prohibition is not based on a compelling justification. It has the effect of denying Appellants the right to have Appellant Maddox considered for public office and to vote for the candidate they prefer. *Williams v. Rhodes*, 393 U.S. 23 (1968). This denial of a fundamental right must be weighed against any State interest said to be served by said prohibition. This is a matter better suited to a consideration on the merits by this Court. The lexicon of democracy condemns all attempts to restrict one's right to run for and hold public office. A great danger lies in not allowing a candidate to submit his qualifications to the scrutiny of the electorate as opposed to restricting the right to run for office, as said prohibition does. *Erwin v. Collier*, 85 So. 2d 852. Said prohibition in restricting the right to seek public office raises a considerable question as to the effect it has on the political processes of the State of Georgia, and is therefore deserving of review by this Court.

Appellants submit that the opinion and judgment of the Supreme Court of Georgia (Appendix "A," Pages 1a-13a) are not in accord with the applicable decisions of

this Court hereinabove referred to, and the Supreme Court of Georgia erroneously misapplied certain decisions of this Court.

The Supreme Court of Georgia (hereinafter referred to as the lower court) cited and quoted extensively from *Taylor v. Beckham*, 178 U.S. 548; *Wilson v. North Carolina*, 169 U.S. 586; *McPherson v. Blacker*, 146 U.S. 1, and *Lassiter v. Northampton County Board of Education*, 360 U.S. 45, to the effect that the States have broad powers to determine the conditions under which the right of suffrage may be exercised and in determining the qualifications of those seeking State offices. Relying on these cases, the lower court seems to hold that a State has a complete, unlimited, and absolute power to impose restrictions and qualifications on the right to vote and seek office. This is a misinterpretation of these cases since they all recognize that the states have broad powers to impose qualifications absent "any discrimination which the 14th Amendment condemns." A State's power to impose restrictions and regulations is always subject to the requirements and limitations of the Due Process and Equal Protection clauses. Appellants specifically challenge said prohibition as being an invidious discrimination. The lower court's answer to this challenge was simply that the States have the power to impose qualifications and restrictions. If this reasoning is valid, then this Court erroneously decided such cases as *Carrington v. Rash*, supra; *Kramer v. Union Free School District*, supra; *Harper v. Virginia Board of Elections*, supra; and *Williams v. Rhodes*, supra.

The lower court referred to the general statement in *Williams v. Rhodes*, supra, to the effect that a state has broad powers to regulate voting, but failed to even dis-

cuss the holding of the Williams case and apply that holding to the case at bar. As we have previously pointed out, the Williams case clearly holds that the 1st and 14th Amendments insure a voter the right to vote for the candidate of his choice, and any restriction or regulation which interferes with this right, as said prohibition does, is unconstitutional unless based on a compelling State interest. Certainly, in light of *Williams v. Rhodes*, supra, a substantial question is raised as to whether said prohibition is constitutional.

The lower court also incorrectly applies the decision in *Fortson v. Morris*, 385 U.S. 231 (1966) to the case at bar. Fortson deals with methods of electing a Governor, election by the electorate or election by the Georgia General Assembly. Either method is constitutional and Fortson goes no further than this. Its the Fortson rationale has no application where the method of election is solely by the electorate. This is the situation in Georgia. The electorate now elect our governor and "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection clause of the Fourteenth Amendment." *Harper v. Virginia Board of Elections*, supra, at 665. Appellants contend that by the application of said prohibition to them, the State is drawing lines inconsistent with Equal Protection of the laws. Fortson does not answer that contention.

The lower court also erroneously states that *Reynolds v. Sims*, supra, and *Gray v. Sanders*, supra, are not relevant to the case at bar. *Reynolds v. Sims* plainly states that a voter has the right to vote for the candidate of his choice. Both cases are relevant for the additional reason that they stand for equality of voting power.

Said prohibition and the lower court's decision render Appellants' right to vote in the 1970 elections meaningless and without substance since they cannot vote for the candidate of their choice.

The lower court in its decision on Pages 4a, 5a, and 9a (Appendix "A,") refers to the fact that the people of Georgia adopted said prohibition, and seems to hold that since said prohibition was adopted by the people, it is constitutional. Of course, this Court has on numerous occasions held that the fact that a majority of the people voted on a constitution, or parts thereof, does not immunize such provision from an attack under the Federal constitution.

Appellants again submit to the Court that they have presented substantial Federal questions and that plenary consideration of the case is needed. They therefore respectfully ask this Court to note probable jurisdiction and set the matter down for oral argument at its earliest convenience.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Georgia be reversed as error, and the prohibition against a governor succeeding himself, contained in Art. V, Sec. I, Par. I of the Constitution of Georgia be declared unconstitutional as violative of Appellants' rights under the 1st and 14th Amendments of the United States Constitution.

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Upon Whom Service Is to be Made

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Counsel for Appellants

PROOF OF SERVICE

I, TULLY M. BOND, JR., hereby certify that I am counsel for the Appellants, Lester G. Maddox and seven others, that I am a member of the Bar of the Supreme Court of the United States, and that on the 12 day of February, 1970, I served the within and foregoing Motion to Advance and Jurisdictional Statement upon the Appellees herein named by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at their proper post office addresses, to-wit:

The Honorable Arthur K. Bolton
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

Lamar Sizemore, Esquire
310 Fulton Federal Building
Atlanta, Georgia 30303

William C. O'Kelley, Esquire
2250 Bank of Georgia Building
Atlanta, Georgia 30303

Henry M. Henderson, Esquire
1303 Healey Building
Atlanta, Georgia 30303

Harold N. Hill, Jr., Esquire
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

Paul L. Hanes, Esquire
310 Fulton Federal Building
Atlanta, Georgia 30303

I further certify that all parties required to be served have been served.

TULLY M. BOND, JR.
Counsel for Appellants

APPENDIX A

(Opinion and Judgment of the Supreme Court of Georgia)

IN THE SUPREME COURT OF GEORGIA	Decided 107
25641	(Jan. 26, 1976)
MADDOX, et al. v. FORTSON, et al.	

ALMAND, Chief Justice. The provision of ART. V, SEC. I, PAR. I of the 1945 Constitution that: "The Governor serving at the time of the adoption of this Constitution and future governors shall not be eligible to succeed themselves and shall not be eligible to hold office until after the expiration of four years from the conclusion of his term of office" is not violative of the provisions of either the First Amendment or the Fourteenth Amendment to the Constitution of the United States.

IN THE SUPREME COURT
OF GEORGIA

25641

MADDOX, et al. v. FORTSON, et al.

Decided
107

ALMAND, Chief Justice. Lester G. Maddox individually and seven other named persons on behalf of themselves and as a group for all electors and registered voters qualified to vote in the general election in the State of Georgia, filed their complaint in Fulton Superior Court against Ben W. Fortson, Jr., as Secretary of State and as Chairman of the State Election Board and numerous other persons as officials or political parties.

The prayers of the complaint were that the court declare the constitutional prohibition (Art. V, Sec. I, Par. IV of the 1945 Constitution which provides: "The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold office until after the expiration of four years from the conclusion of his term of office", be declared violative of the equal protection clause of the 14th Amendment and the 1st Amendment to the Federal Constitution.

The complaint alleges: That Lester G. Maddox, the incumbent Governor of the State of Georgia, desires to be a candidate for Governor of the State for a term beginning in January, 1971, in the Democratic Party Primary and the General election to be held in 1970. That though he is fully qualified in other respects the defendants, in their official state and

party positions will refuse to permit him to be a candidate in the Primary and General election in 1970 because of the Constitutional prohibition above quoted.

It was further alleged that an actual controversy existed between the plaintiffs and the defendants and this action is authorized by the Declaratory Judgment Act (Anno. Code 110-1101) and a decision is needed to remove the uncertainty as to the right of Maddox to be a candidate for Governor in the 1970 elections and to provide the co-plaintiffs of Maddox an equal and fair opportunity to vote for Maddox in said elections.

To this complaint the several defendants filed their answers and moved to dismiss the plaintiffs' complaint on the ground that it failed to state a claim upon which relief could be granted.

When the cause came on for a hearing the Court found that the challenged provision of the Constitution of Georgia prohibiting an incumbent Governor from being eligible to run for another term did not violate the equal protection clause of the 14th Amendment nor the 1st Amendment to the Federal Constitution. The motion to dismiss was sustained. The appeal is from this order.

In *Williams v. Rhodes*, 360 U. S. 45, 89 S.Ct. 5 (1968), the Court said: "In determining whether or not a state law violates the equal protection clause we must consider the facts and circumstances of the law which the state claims to be protected and in terms of those who are disadvantaged by the classification."

In order "to consider the facts and circumstances" under which Art. V, Sec. I, Par. I of the Constitution of 1945 was adopted, we look backward in the State's constitutional history to find the interests which the State claims to be protecting to determine why the people in adopting their Constitution prohibited an incumbent Governor serving a term of four years, from being eligible to the office until after the expiration of four years from the conclusion of his term of office.

Article 23 of Georgia's first Constitution (1777) provided a one year term for the Governor and made him ineligible to the office for two years after his service of one year.

Article 2 of the 1789 Constitution provided a term of two years with no prohibition as to holding the office in the future.

Article 3, Section 1, Par. 1 of the 1861 Constitution contained the same provision as the 1789 Constitution.

Article 3, Section 1, Par. 1 of the 1865 Constitution provided a term of two years for the Governor but made him ineligible for re-election after expiration of a second term for a period of four years.

Article 4, Section 1 of the 1868 Constitution fixed the term at four years with no prohibition for service of a future term.

Article 5, Section 1, Par. 2 of the 1877 Constitution provided a term of two years but that the incumbent at the end of a second term was ineligible for four years. This Article of the Constitution was amended in 1941 (Ga. L. 1941, p. 86) to provide for a four

year term and that at the end of the term the incumbent Governor would be ineligible for election to the succeeding term.

In 1945 the Commission to draft a new Constitution recommended to the General Assembly the continuation of the four year term as provided in the 1789 Constitution, as amended, but left out of the proposal the provision as to ineligibility. The General Assembly refused to follow this proposal and put in the Constitution the same provisions of the 1877 Constitution as amended in 1941. The present provision under attack here is found in Art. V, Sec. I, Par. I (Code 2-3001) of the Georgia Constitution.

So it will be seen that in the 192 years of the history of the State Constitution the people of Georgia have for 107 years had in their Constitution a provision making ineligible the election of an incumbent Governor for another term at the succeeding election after serving four years.

An examination of the Constitutions of the several States discloses that twenty-four States of the Federal Union have restrictions as to eligibility after service of one or two terms similar to Georgia: Alabama, Alaska, Delaware, Florida, Indiana, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia (The Book of the States, 1968-69, pp. 125, 133).

In 1951, the 22nd Amendment to the Federal Constitu-

tion was approved. This amendment precludes an incumbent President from seeking the office for a third time and it is more stringent than the Georgia provision which permits an incumbent Governor to seek the office after an interval of four years.

2. Throughout the history of the Federal Union since the adoption of the Constitution of the United States in 1789, it has been recognized that each state in the Federal Union has the sole right to determine the qualifications of those seeking state or local offices and the qualifications of voters in state elections as long as the laws of a state did not deny to the citizens of the state their rights under the Federal Constitution.

In *Taylor and Marshall v. Beckham*, 178 U.S. 548, pp. 570-1, 44 L.Ed. 187, 20 S.Ct. 890 (1899), it was said: "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

In *Wilson v. North Carolina*, 169 U.S. 586, p. 594, 42 L.Ed. 865, 18 S.Ct. 435 (1897), the Court said: "In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes and the terms upon which it

should be held by the person filling the office." "So long as our present dual form of government endures, the States, it must never be forgotten are independent of the general government as that government within its spheres is independent of the States. *Collector v. Day*, 11 Wall. 113, 124." *Brush v. Commission*, 300 U.S. 352, p. 364, 81 L.ed 691, 57 S.Ct. 495.

The right to vote as intended to be protected by the 14th Amendment refers to the right to vote as established by the laws and Constitution of the State, which has broad powers to determine the conditions under which such right of suffrage may be exercised, such as residence requirements, age or previous criminal record, absent of course, any discrimination which the 14th Amendment condemns. *McPherson v. Blacker*, 146 U.S. 1, 36 L.ed 869, 13 S.Ct. 3 (1892). *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, pp. 50-51, 3 L.ed(2) 1022, 79 S.Ct. 985. In the recent case of *Williams v. Rhodes*, (supra), it was said that "The State is left with broad powers to regulate voting which may include laws relating to the qualifications and functions of electors".

In *Fortson v. Morris*, 385 U.S. 231, 17 L.ed(2) 330, 87 S.Ct. 446 (1967), (a case in which to some respects the instant case is a collateral descendent) it was held: "There is no provision of the United States Constitution or any of its amendments which expressly or impliedly dictates the method a State must use to select its Governor". Page 333.

3. Having considered the general principles of Consti-

tutional law that are relevant to this case we now consider the specific grounds upon which it is asserted the eligibility clause of the State Constitution which forbids the plaintiff Maddox, the incumbent Governor, from seeking election to the office for a second term until after four years, violates the equal protection clause of the 14th Amendment to the Federal Constitution.

It is argued that since there is no Constitutional prohibition against other state officers elected by the people running to succeed themselves, that the Constitutional provision under attack constitutes an invidious discrimination to the injury of Maddox.

The answer to this contention is that the constitutional and the statutory powers of the Governor are such that the people, in placing the ineligibility clause in the Constitution as to the Governor, had the right to put the office of Governor in a class by itself. As pointed out in the Brief of the Attorney General, "The Governor alone has the power to veto bills passed by the General Assembly (Ga. Code Ann. §2-3015). He has the power to fill vacancies in office. (Ga. Code Ann. § 2-3013). He is by law a member of approximately 35 bureaus, boards, commissions and committees. (Georgia Official and Statistical Register, 1965-66, p. 25). He is ex-officio Director of the Budget Bureau (Ga. Code Ann. § 40-403) which administers the State's $850,000,000 budget. All payments from the State's treasury are made upon his warrant. (Ga. Code Ann. § 40-204). He can suspend the payment of taxes until the General Assembly convenes. (Ga. Code Ann. § 40-205). He can call the General

Assembly into special session. (Ga. Code Ann. § 2-1603). He is the commander-in-chief of the National Guard. (Ga. Code Ann. § 2-3010). Other constitutional officers report to him. (Ga. Code Ann. § 2-3017)."

There is a reasonable and justifiable difference between the office of Governor and other statehouse elected officers and it cannot be said to amount to invidious discrimination.

This Constitutional provision does not apply solely to Maddox, the incumbent Governor, but is applicable to all others who serve one term as Governor. The people of Georgia, by their votes in approving the Constitution of 1877, the 1941 Amendment and the 1945 Constitution, have decided that it is to the best interest of the State that one who has served a term of four years as Government, must wait four years before he can again seek the office. We fail to see how this provision of the Constitution works to the disadvantage of the incumbent Governor.

We do not give any weight to the contention that the provision of the Constitution under attack does not apply to incumbent Governor because he was elected by the General Assembly and not by the people of Georgia.

His term of office is four years and the prohibition against his serving a second term for four years is not based on how he was elected, but on the fact of his service for one term. The fact that he is now seeking a declaration of his right to seek another term is a recognition that his service of his present term is a

result of his election under the provisions of the Constitution.

Accordingly, we hold that the provision of Art. V, Sec. 1, Par. 1 of the 1945 Constitution under attack does not offend the provisions of Amendments 1 and 14 of the Constitution of the United States.

4. Having held such provision is not violative of the Federal Constitution, it follows that petitioner Maddox, being subject to the provisions of Art. V, Sec. 1, Par. 1 of the 1945 Constitution therefore would not be eligible to offer in the Primary and General elections of 1970 as a candidate for Governor. It thus becomes unnecessary to decide whether such provision violates the right of the plaintiffs, as voters, under the 1st and 14th Amendments to the Federal Constitution. Their right to vote is to vote only for a candidate who is eligible to hold the office of Governor. So, the "one man, one vote" cases as *Reynolds v. Sims*, 377 U.S. 533, 12 L.ed(2) 506, 84 S.Ct. 1362; *Gray v. Sanders*, 372 U.S. 368, 9 L.ed(2) 821, 83 S.Ct. 801; and, *Baker v. Carr*, 369 U.S. 186, 7 L.ed(2) 663, 82 S.Ct. 691, are not relevant.

The judgment of the trial court is affirmed. All the Justices concur.

25641. MADDOX et al. v. FORTSON, Secretary of State et al.

FELTON, Justice, concurring specially. 1. I concur in the judgment insofar as the seven appellants, exclusive of Governor Maddox, are concerned, for the reason that, in my opinion, the decision in Fort-

son, *Secretary of State of Georgia v. Morris*, 385 U.S. 231, is controlling on the question whether any of their claimed constitutional rights were violated by the provision of Georgia Constitution attacked in this action by these appellants. I cannot see much difference between being deprived of the right to vote for or against a candidate for governor in this case and the *Fortson* case. In neither case could the people elect a governor by their direct votes.

2. As to Governor Maddox's contentions, I concur in the judgment of the trial judge for the reason that the prohibition against Governor Maddox's succeeding himself is a provision in the Georgia Constitution. In such case there is a presumption that the people had a compelling reason or compelling reasons for the inhibition against a governor's succeeding himself. The burden of proof was on Governor Maddox to show the absence of such reasons, and no evidence was introduced to carry this burden. There were reasons argued why the inhibition was justified, but they amounted to no more than argument and little more than figments of the imagination. The burden would be on the State to show a compelling reason for the inhibition if a statute were attacked as being unconstitutional (*Rhodes v. Williams*, 393 U.S. 23) rather than a provision of a state constitution.

25641. SUPREME COURT OF GEORGIA

Atlanta, January 26, 1970

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Lewis G. Maddox, et al. v. Ben W. Fortson, Jr., Secretary of State, et al.

This case came before this court upon an appeal from the Superior Court of Fulton County and after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, Felton, J., concurs specially.

DENIAL OF MOTION FOR REHEARING
SMALL SUPREME COURT OF GEORGIA

Atlanta, January 20, 1970

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Jeffrey Maddox, et al. v. Jack M. Turpin, Jr., Secretary of State, et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be denied.

APPENDIX B

(Order and Judgment of the Trial Court)

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

ESTHER G. MADDOX, ET AL.,

Plaintiffs

vs.

BRUCE W. LORIMER, JR., as Secretary of State of the State of Georgia and as Chairman of the State Election Board of Georgia; STATE ELECTION BOARD OF GEORGIA; ARTHUR K. BOLTON, as Attorney General for the State of Georgia, ET AL.,

Defendants

CIVIL ACTION FILE NUMBER B-80789

ORDER

When [illegible] explanatory matters are an issue as related to the [illegible] have been admitted by the respective defendants in their responses and therefore the Court does not make a formal finding of fact.

The State of Georgia has occupied a rather unique position in American constitutional history. The State has been governed under eight Constitutions. It was one of the few of the thirteen original States to organize a government without a written constitution. The facts are the State adopted a Constitution in 1777 only after it had been urged to do so by the Congress of the United States

Subsequently, prior to the war between the sections, Constitutions were adopted in 1789 and in 1798.

It was only at the theoretical end of Reconstruction that the 1877 Constitution was adopted and the latter was so well finalized it served as the organic law of the State until the adoption of the current Constitution in 1945.

Article V, Section I, Paragraph I of the Constitution of Georgia (Ga. Code Section 2-3001 of the Code of Georgia of 1933), is as follows:

> "2-3001. Par. I. The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office. He shall have a salary of Seven Thousand Five Hundred Dollars per annum until January 1, 1947. The Salary of the Governor for each year thereafter shall be Twelve Thousand Dollars per annum until otherwise provided by a law passed by a majority vote of both branches of the General Assembly, which shall not be increased or diminished during the period for which he shall have been elected; nor shall he receive, within that time, any other emolument from the United States, or either of them or from any foreign power. The State officers required by this Constitution to be elected at the same time, for the same term, and in the same manner as the Governor shall also hold office for four years."

In Article V, Section I, Paragraph I of the Consti-

tution of 1945, we are concerned with the following language therein contained:

> The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office.

It will be noted that the Constitution of 1877 limited the term of the Chief Executive and as pointed out by able counsel for the complainants, the origin of such restriction had to do with the distrust by the Georgia electorate of Colonial and Reconstruction Governors. At the time of the adoption of the 1945 Constitution, the people no longer had such distrust but did have concern relating to the possibilities of the Chief Executive through the avenues of "power politics" perpetuating himself in office.

This Court can not and does not propose to express the current sentiments of the people of Georgia as addressed to the restriction or limitation.

The Court can only give consideration to the findings and recommendations of the Constitutional Revision Commission of 1960 as submitted to the 1970 Session of the General Assembly of Georgia, as outlined in Article IV, Section I, Paragraph 2:

> Paragraph 2. *Qualifications of Elected Executive Officials.* No person shall be eligible to hold any elective executive office of this State unless he shall have been a citizen of the United States for at least fifteen years and shall have resided in this State at least six years immediately preceding the time of the beginning of the term of office to which he was elected at the time of his appointment and

shall be at least thirty years, and not more than seventy years, of age when elected. No person shall be elected or appointed Attorney General unless at the time of the beginning of the term of office to which he was elected or the time of his appointment he shall have practiced law in this State for at least ten years and shall be qualified at the time of his election or appointment to practice law in the Courts of this State. The Governor shall not be eligible to succeed himself and shall not be eligible to hold such office until after the expiration of four years from the conclusion of his term of office. The General Assembly shall have the authority to prescribe additional qualifications for all elected executive officers.

Significantly, the identical language relating to tenure encompassed in the section dealing with qualifications of elected executive officers is contained in the 1945 Constitution.

Logically, the compelling reason for retaining the prohibition against succession is emphasized by the action of the 1960 Commission and its recommendations that the limitation be a part of the proposed new Constitution.

Admittedly construing the scope of the power of the people to judge qualifications in organic law is difficult, not only because history and precedent shed no light; for because there is no definitive test or way of deciding if such "qualification" restricting tenure competes with the interest of any individual or group of individuals within the State.

The Court therefore must consider whether or not the restriction is arbitrarily capricious and unreasonable.

Therefore the question involved is whether that por-

tion of Article V, Section I, Paragraph I of the Constitution of Georgia as follows:

> "The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office."

is contrary to the Fourteenth Amendment of the United States Constitution, to wit, the due process law and equal protection of the law clauses.

The complainants attack the constitutionality of the foregoing portion of Article V, Section I, Paragraph I of the Constitution of Georgia of 1945 because it deprives the complainants of their voting rights. The complainants contend the present case is only "a voting case".

Learned and able counsel for the complainants have in the judgment of this Court cited the Court every possible authority which sheds light upon the controversy. The Court has reviewed these authorities and finds three cases which are of paramount consideration, *Gray v. Sanders*, 372 U.S. 369, *Baker v. Carr*, 369 U.S. 239, which was decided in 1962 (See also *Sanders v. Gray*, 203 F. Supp. 158), *Reynolds v. Sims*, 377 U.S. 533 (1964). The Georgia County Unit System was eliminated in *Gray v. Sanders*, 372 U.S. 368, and had the effect of developing the voting privileges of the citizens.

The "one man, one vote" concept is now well established by innumerable decisions by the Supreme Court of the United States. Axiomatically, this concept is the law of the land.

The one person, one vote principle upon which the

complainants rely was announced first in *Gray v. Sanders*.

This decision reaffirmed the case of *Lassiter v. Northampton County Bd. of El.*, 360 U.S. 45.

There the Court said (360 U.S. at 50-51, 3 L. Ed 2d at 1076-1077):

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, (citing cases), absent of course the discrimination which the Constitution condemns. * * * So while the right of suffrage is established and guaranteed by the Constitution (citing cases) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress . . . has imposed. * * * Residence requirements, age, previous criminal record (citing cases) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."

The question posed here is simply can a state within limits specify the qualifications of its officers in state elections, and thus limit the right to vote only for legally qualified candidates.

Elementary, there is a presumption in favor of constitutionality. This principle is so well established it is not necessary to cite authorities in support thereof.

In *Nebbia v. New York*, 291 U.S. 502 — 1934:

> "The guaranty of due process, as has often been held, demands only that the laws shall not be unreasonable, arbitrary or capricious."

The Gray case held that it had been demonstrated that Georgia voters were denied equal protection of the laws

by operation of a county unit system under which state officials were elected by a majority of counties voting as units instead of by a majority of individual voters. This discrimination against large county voters was held to deny them the equal protection of the laws; but as the Court said in 373 U.S. at page 378, the case was "only a voting case". Not a word in the Court's opinion indicated that it was intended to prevent a state through its Constitution to require of its state officers certain specified qualifications. The Gray case did no more than to require the State to eliminate the county unit machinery from its election system.

Justice Fortas dissenting in the case of *Fortson v. Morris*, 385 U.S. 250, had this to say:

> "The candidate receiving more votes than any other must receive the office *unless he is disqualified on some constitutionally permissible basis.*"

It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their officers should be exclusive, and free from external interference except so far as plainly provided by the Constitution of the United States (See *Taylor v. Beckham*, 178 U.S. 548, particularly page 570).

The purpose of a limitation against eligibility for continued re-election to the same office would appear to be to avoid the temptation to use the office in an effort to sustain tenure. Not only is the idea of entrenchment in office repugnant to the national concept that no one has an inherent right to the office, but the possibility of creating so-called political machines has inspired constitutional and statutory measures of prevention which have

been recognized by courts (*See Doran v. Walters*, 132 Ky. 54; *Braswell v. Teasley*, 194 Ala. 574; *Roman v. Tatnall*, 42 Del. 328.).

The national concept in this regard is prominent when we consider that the Constitution of the United States limits the term of office of the President to two four year terms. There is no national or constitutional right to hold public office, but only a privilege. The right to hold public office is subject to the legislative power to impose reasonable qualifications for the office (67 CJS 15). Therefore the right to hold public office is plainly subject to the governmental power to prescribe reasonable qualifications for the holding of such power, a power which, in our federal system, is primarily one within the competence of the state.

It is not necessary to refer to authorities which hold that religion, economic status, property, race or sex are such required qualifications by statute or basic law that are repugnant and in conflict with the Fourteenth Amendment of the Constitution of the United States.

The Court is not persuaded by the argument that although the Constitution of Georgia allows other constitutional officers to succeed themselves, the Chief Executive does not enjoy such a right and therefore this constitutes an invidious discrimination against the Chief Executive which deprives him of equal protection of the law.

In the first place the office of Chief Executive is distinctive and it follows if the people of Georgia in promulgating their constitution had desired to require of such constitutional officers the qualifications required of the office of Governor, the people in their wisdom could and

would have done so. Moreover, since the adoption of the 1945 Constitution, the people have had an opportunity each four years in every General Election to strike down the succession prohibition.

If the people in their sovereign capacity, in convention assembled, do by the terms of an organic law established by them and for them, reserve unto themselves and in fact do through constitutional processes adopt standards relating to qualifications to hold office, no other branch of the government can thereafter interfere with this reserved right. A departure from that high principle might well endanger the stability of the entire governmental structure.

It is usual for constitutions to contain provisions governing qualifications for candidacy to offices created therein. Such limiting provisions may be general in nature, such as "all qualified electors shall be eligible for public office", or may prescribe specific requirements, as, for example, the candidate "shall be thirty years of age".

The findings and recommendations of the Constitutional Revision Commission of 1969 deals with qualification concerning age as follows: "and shall be at least thirty years, and not more than seventy years of age when elected."

Among the qualifications as required by the 1945 Constitution, candidates for Chief Executive must be at least thirty years of age. The proposed Constitution disqualifies any citizen who might desire to seek the office of Governor who has passed the age of seventy.

Under the present Constitution as well as the proposed Constitution, the citizens of this State who are not at

least thirty years of age are not legally qualified to aspire to the office of Governor. In the event the proposed Constitution should be submitted to the people by the General Assembly and ratified by the people, the citizens of this State more than seventy years of age will not be legally qualified to aspire to the highest office in the state.

It can not be seriously urged that these requirements with reference to eligibility to hold this office are repugnant to the Fourteenth Amendment to the Constitution of the United States.

It is a matter of common knowledge that many of the great accomplishments by many men were attained before they reached the age of thirty, and likewise a matter of common knowledge that many who have had the good fortune of living more than three score and ten have been in many instances throughout history great world leaders.

Would any one with knowledge of constitutional law take the position that such required qualifications in the Constitution are capricious, arbitrary and unreasonable in that such qualifications deprives the voter of voting for the candidate of his choice? This Court doubts that any student of the Constitution would raise such an issue.

This Court firmly believes the prerequisite qualification of becoming a candidate for the office of Chief Executive for the State of Georgia which restricts tenure is a reasonable qualification. I therefore find that portion of Article V, Section I, Paragraph I of the Constitution of Georgia of 1945 complained of by the complainants is not offensive to the Constitution of the United States.

The restriction does not dilute a vote, it does not dis-

enfranchise any citizens; it is not aimed at any individual or class. The constitutional provision simply require of the voters that they vote only for qualified candidates as commanded by the Constitution.

The power that put that portion of Article V, Section I, Paragraph I of the Constitution in the instrument have the power to remove it — the people.

To rule otherwise in the judgment of this Court, would be an undertaking by judicial edict to rewrite the peoples Constitution.

The Court interprets the law as it finds the law to be, not as an individual Judge may think it should be.

By local enactments public officials other than the Chief Executive in Georgia are not eligible to hold offices longer than one term (See *Chapman v. Walden*, 183 Ga. 395).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion filed by each of the respective defendants that the complaint failed to state a claim against the defendants upon which relief may be granted either at law or in equity is each hereby sustained, same being the first defense enumerated by said respective defendants in their respective responses.

This 13th day of December 1969.

/s/ OSGOOD O. WILLIAMS

Judge, FSC. AJC.

GEORGIA

FULTON COUNTY

I do hereby certify in accordance with the procedure provided for under Georgia Laws 1968, page 1073, being the Appellate Procedure Act of 1965, as amended, that the instant order and ruling of the Court is of such importance to the case under consideration that immediate review should be had; and it is so ordered by this Court.

This 13th day of December 1969.

/s/ OSGOOD O. WILLIAMS

Judge, FSC, AJC.

APPENDIX C.

PROVISIONS OF THE GEORGIA CONSTITUTION AND LAWS DIRECTLY INVOLVED IN THIS LITIGATION.

ART. II, SEC. II, PAR. I; Ga. Code Ann. 2-801.

Registration of electors; who disfranchised.—The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote or hold any office, or appointment of honor, or trust in this State, to-wit: 1st, Those who shall have been convicted in any court of competent jurisdiction of treason against the State, of embezzlement of public funds, malfeasance in office, bribery or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such persons shall have been pardoned. 2nd. Idiots and insane persons.

ART. V. SEC. I, PAR. I; Ga. Code Ann. 2-3001.

Governor; term of office; salary, etc.—The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office. He shall have a salary of seven thousand five hundred dollars per annum until January 1, 1947. The salary of the Governor for each year thereafter shall be twelve thousand dollars per annum until otherwise provided by a law passed by a majority vote of both branches of the General Assembly, which shall not be increased

or diminished during the period for which he shall have been elected; nor shall he receive, within that time, any other emolument from the United States, or either of them, or from any foreign power. The State officers, required by this Constitution to be elected at the same time, for the same term, and in the same manner as the Governor shall also hold office for four years.

ART. V, SEC. I, PAR. II; Ga. Code Ann. 2-3002.

Election for Governor.—The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same.

ART. V, SEC. I, PAR. III; Ga. Code Ann. 2-3003.

Transmission, canvassing and publising election returns.—The returns of each election district in a gubernatorial election shall be sealed up by the superintendent thereof separately from other returns and shall be transmitted to the Secretary of State. On the Tuesday next following the general election, unless the date therefor shall be changed by law, the Secretary of State shall transmit said returns to a Constitutional Officers Election Board which shall be composed of the Speaker and clerk of the House of Representatives, the President pro tempore and the secretary of the Senate, and the chairmen of all standing committees of the General Assembly. Such board

shall open and publish the returns, and the person having the majority of the whole number of votes shall be declared duly elected Governor of this State. Each candidate for Governor shall be entitled to designate one person to be present at the opening of the returns.

ART. V, SEC. I, PAR. IV; Ga. Code Ann. 2-3004.

Run-off Election. In the event no gubernatorial candidate receives a majority of the whole number of votes cast in the general election, the Constitutional Officers Election Board shall continue the gubernatorial election by immediately calling a run-off election and designate as candidates therein the two persons who received the highest number of votes, who continue in life and have not declined to continue as a gubernatorial candidate. This run-off election shall be held on the third Tuesday immediately following the general election unless the date thereof shall be changed by the General Assembly. The run-off election shall be a continuation of the general election and only the electors who were entitled to vote in the general election shall be entitled to vote therein; and only those votes cast for the two persons designated shall be counted in the tabulation and canvass of the votes cast. The provisions relating to the transmission of the returns in the general election, the opening of the returns, their tabulation, canvassing and publication shall apply to the run-off election. On the Tuesday next following the run-off election, the Constitutional Officers Election Board shall convene, open, canvass, tabulate and publish the returns of the run-off election. The person having the highest number of votes entitled to be counted in the run-off election shall be declared the duly elected Governor of this State.

ART. V, SEC. I, PAR. VI; Ga. Code Ann. 2-3006.

Qualifications of Governor.—No person shall be eligible to the office of Governor, who shall not have been a citizen of the United States fifteen years, and a citizen of the State six years, and who shall not have attained the age of thirty years.

GA. CODE ANN. SEC. 34-301.

Powers and duties of Secretary of State.—The Secretary of State shall exercise all the powers granted to him

by this Code, and shall perform all the duties imposed upon him by this Code, which shall include the following:

(a) To determine the forms of nomination petitions, ballots and other forms he is required to determine under the provisions of this Code;

(b) To receive registration statements from political parties and bodies and to determine their sufficiency prior to filing in accordance with the provisions of this Code and to settle any disputes concerning such statements;

(c) To receive and determine the sufficiency of nomination petitions of candidates filing notice of their candidacy with him in accordance with the provisions of this Code;

(d) To certify to the proper ordinaries official lists of all of the candidates who have filed notice of their candidacy with him in substantially the form of the ballots to be used in the election, and shall add to such form the language to be used in submitting any proposed constitutional amendment or other question to be voted upon at such election;

(e) To furnish to the proper ordinaries all blank forms, including tally and return sheets, for use in all elections, and such forms shall have printed thereon appropriate instructions for their use;

(f) To receive from the ordinaries the returns of elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this Code;

(g) To furnish upon request a certified copy of any

document in his custody by virtue of the provisions of this Code and to fix and charge a fee to cover the cost of furnishing same;

(h) To perform such other duties as may be prescribed by law; and

(i) To determine and approve the form of ballots for use in special elections.

GA. CODE ANN. SEC. 34-801.

General primary.—Whenever any political party shall hold a primary to nominate candidates for public offices to be filled in the ensuing November election, the same shall be held on the second Wednesday in September in each even-numbered year. The preceding provision of this section shall not apply to a primary held to nominate candidates for membership in the House of Representatives of the General Assembly or for county offices to be filled in the November election of 1964, and upon the holding of such election this sentence shall be automatically repealed.

GA. CODE ANN. SEC. 34-1006.

Qualification of candidates.—Unless otherwise provided by law, all candidates for party nomination in a primary shall qualify as such candidates in accordance with the procedural rules of their party: Provided, however, that no person shall be prohibited from qualifying for such office who meets the requirements of such procedural rules and (i) who is eligible to hold the office which he seeks, (ii) who is not prohibited from being nominated or elected by provisions of section 34-106 or 34-107, as presently written or hereafter amended, and (iii) who, if party rules so require, affirms his allegiance to his party by signing the following oath:

"I do hereby swear or affirm my allegiance to the .....(name of party) Party."

In the case of a general primary, the candidates shall commence qualifying not earlier than 135 days prior to the date of such primary and not later than the last Wednesday in May. All parties shall close their qualifications at 12:00 noon on the second Wednesday in June immediately preceding such primary. In the case of a special primary, the candidates shall qualify at least 15 days prior to the date of such primary.

Within one hour after the qualifications have ceased, the county executive committee of each political party or body shall post at the county courthouse a list of all candidates who have qualified with such executive committee, and the State executive committee of each political party or body shall post a list of all candidates who have qualified with such committee at the courthouse of the county in which such executive committee's office is located.

In the event of the death of a candidate prior to the date of a primary, the State executive committee or other committee of the party authorized by party rule may reopen qualification for the office sought by the deceased candidate for a period of not less than one nor more than three days.

GA. CODE ANN. SEC. 79-205.

Rights of citizens.—Among the rights of citizens are enjoyment of personal security, of personal liberty, private property and the disposition thereof, the elective franchise, the right to hold office unless disqualified by the Constitution and laws, to appeal to the Courts, to testify

as a witness, to perform any civil function, and to keep and bear arms.

GA. CODE ANN. SEC. 110-1101.

Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy.—(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in paragraph (a) of this section, the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that such declaration should be made, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.